*__THE HONOURABLE SRI JUSTICE V.V.S.RAO__

+ WRIT PETITION No.2120 of 2006

% 07.2.2006

V.SRIRAMULU

...PETITIONER

Vs.

$ KARUR VYSYA BANK LIMITED represented by its

BRANCH MANAGER, Srinivasa Nagar, Nandyal.

AND OTHERS

...RESPONDENTS

! COUNSEL FOR PETITIONER: Mrs.CH.VEDAVANI

^ COUNSEL FOR RESPONDENTS: NONE APPEARED

<GIST

>HEAD NOTE:

? CASES REFERRED:

1. (2002) 2 All ER 936
2. 2001 (4) All ER 604 = (2002) 3 WLR 183
3. 2002 (5) SCC 111 = 2003 (1) ALD 40 (SC)
4. AIR 1975 SC 1329
5. 2003 AIR SCW 4995 = 2004(1) Supreme 25

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Between:

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THE HON'BLE SRI JUSTICE V.V.S.RAO

WRIT PETITION No.2120 OF 2006

ORDER:

The petitioner is father-in-law of one Smt V.Srivani, (wife of V.Giridhar, third respondent herein) who is proprietor of second respondent concern. Second

respondent availed loan of Special Over Draft Facility (SOD) for Rs.15,00,000/- (Rupees fifteen lakhs only) against hypothecation of raw materials and finished products. The petitioner and respondents 3 and 4 herein created mortgage of the house to secure the loan as guarantors. There was a default on the part of the second respondent in repayment of the loan. Therefore, the first respondent bank issued a notice under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (the Act, for brevity) on 16.05.2005 proposing to enforce the security. The second respondent was called upon to pay a sum of Rs.17,40,437/- (Rupees seventeen lakh forty thousand four hundred and thirty seven only) within sixty days from the date of receipt of the said notice. The second respondent was also informed that the default on its part would entail any action under Section 13(4)(a) to (d) of the Act. The second respondent did not pay the amount. Therefore, the first respondent initiated action under Section 13(4) of the Act and issued auction notice proposing to sell house bearing door No.17/144-3, situated in Nandyal Town, Kurnool District for realizing the security. Aggrieved by the same, the petitioner filed the present writ petition seeking a writ of certiorari to quash the notice under Section 13(2) of the Act issued by the first respondent.

Learned counsel for the petitioner, Mrs.Ch.Vedavani, vehemently contends that the action initiated by the first respondent Bank under Section 13(2) of the Act and thereafter action under Section 13(4) of the Act is illegal and without jurisdiction. According to the learned counsel, the Act has no application for the recovery proceedings initiated by the first respondent against the petitioner in respect of SOD availed by the second respondent. She would urge that the first respondent has not classified SOD facility availed by the second respondent as a Non-Performing Asset (NPA) in accordance with the norms prescribed by the Reserve Bank of India in its Master Circular, dated 17.07.2004, and therefore notice issued under Section 13(2) of the Act is bad and illegal. She places reliance on the definition of Non-Performing Asset as defined in Section 2(o) of the Act. She further submits that as the first respondent is discharging public functions, a writ would lie under Article 226 of the Constitution of India.

Section 2(o) of the Act defines NPA as an asset or account of the borrower, which has been classified by a bank as substandard, doubtful and loss asset in accordance with the directions or guidelines issued by the authority of a bank administered or regulated by a body or authority established by any law for the time being in force. If such bank is administered by an authority or body, which is not established by any law for the time being in force, an account of a borrower can be treated as NPA in accordance with the directions or guidelines relating to assets classification issued by Reserve Bank of India. Reserve Bank of India issued guidelines in Master circular No.DBOD No.BP.BC.10/21.04.048/2004-2005, dated 17.07.2004, under the nomenclature ‘Prudential Norms on Income Recognition, Asset Classification and Provisioning Pertaining to Advances’ (prudential norms, for brevity). A copy of the original circular is not placed before this Court. The learned counsel, however, placed before this Court extracts of the circular from “Law and Practice of Securitisation & Reconstruction of Financial Assets and Enforcement of

Securities Interest, by Dr.R.G.Chaturvedi (pp.189-191)". As per these prudential norms, Non-Performing Assets are defined as under.

Non-performing Assets – Norms for classification.

An asset, including a leased asset, becomes non-performing when it ceases to generate income for the bank.

A "non-performing asset", abbreviated as NPA, has been defined as a credit facility in respect of which the interest and/or instalment of principal has remained 'past due' for a specified period of time. The specified period has been reduced in a phased manner as under.

Year ending March 31	Specified period
1993	Four Quarters
1994	Three Quarters
1995 onwards	Two Quarters

An amount due under any credit facility is treated as 'past due' when it has not been paid within 30 days from the due date. Due to the improvements in the payment and settlement systems, recovery climate, upgradation of technology in the banking system, etc., it had been decided to dispense with 'past due' concept with effect from March 31, 2001. Accordingly, as from that date, a non-performing asset (NPA) shall be an advance where-

i. interest and/or instalment of principal remains overdue for a period of more than 180 days in respect of a Term Loan;

ii. the account remains 'out of order' as indicated in paragraph 5-6.3 below, in respect of an Overdraft/Cash Credit (OD/CC);

iii. the bill remains overdue for a period of more than 180 days in the case of bills purchased and discounted;

iv. interest and/or instalment of principal remains overdue for two harvest seasons but for a period not exceeding two half-years in the case of an advance granted for agricultural purposes; and

v. any amount to be received remains overdue for a period of more than 180 days in respect of other accounts.

With a view to moving towards international best practices and to ensure greater transparency, the '90 days' overdue norm for identification of NPAs has been adopted, from the year ending March 31, 2004. Accordingly, with effect from March 31, 2004, a non-performing asset (NPA) shall be a loan or an advance where:

i. **interest and/or instalment of principal remain overdue for a period of more than 90 days in respect of a term loan;**

ii. **the account remains 'out of order' as indicated in paragraph 5-6.3 below, in respect of an Overdraft/Cash Credit (OD/CC);**

iii. **the bill remains overdue for a period of more than 90 days in the**

case of bills purchased and discounted;

iv. **interest and/or instalment of principal remains overdue for two harvest seasons but for a period not exceeding two half years in the case of an advance granted for agricultural purposes;**

v. **any amount to be received remains overdue for a period of more than 90 days in respect of other accounts.**

(emphasis supplied)

As per the above norms (see highlighted portion), with effect from 31.03.2004 a loan or advance where interest and instalment of principal remain overdue for a period of more than 90 days, is NPA. This is neither denied nor disputed by the learned counsel for the petitioner. The question, therefore, is whether the loan taken by the second respondent as SOD is NPA of the first respondent.

A copy of the notice issued under Section 13(2) of Act is annexed to the writ petition. A plain reading of the same would show that the second respondent availed SOD on 11.09.2003 in a sum of Rs.15,00,000/-, that the loan is secured by equitable mortgage by deposit of title deeds in respect of the house bearing door No.17/144-3, Nandyal town, Kurnool District and by way of hypothecation of fully paid stocks of all varieties of dals, raw materials, work-in-progress and finished products and the personal guarantee issued by the petitioner and respondents 3 and 4. A reading of the notice under Section 13(2) of Act further reveals that the second respondent failed to keep up the commitment as a result of which, the interest had been accruing from time to time and gone up to Rs.17,40,437/- with a further interest at 15% per annum with quarterly rests. Going by the notice, a reasonable inference can be drawn that the second respondent never repaid any amount nor paid any instalment after availing the loan on 11.09.2003. This would clinchingly show that the first respondent did not act illegally while issuing notice under Section 13(2) of the Act.

The above observations are made having regard to the material placed before this Court and the averments made in the affidavit filed by the petitioner. Whether SOD advance availed by the second respondent is a NPA of the first respondent and whether the first respondent was justified in initiating action under the Act are matters which can be best adjudicated by appellate authority under Section 17 of the SARFAESI Act. This is because a writ petition would not lie against the first respondent, which is a Company registered under the Companies Act, 1956, engaged in the banking business.

The writ petition filed against a private bank is not maintainable. First respondent is Company registered under Companies Act and is engaged in banking business. The same is not a creation of statute nor established under the provisions of statute. Merely because, a private Bank is regulated or controlled by law made by Parliament to regulate banking business, it cannot be said that such body

discharges public functions or vested with public duty. The precedents in this regard in British Common Law jurisdiction as well as in the field of Indian Administrative Law are galore. It is not necessary to extract copious passages from various decisions.

The Court of Appeal in **R (on the application of Heather and others) v Leonard Cheshire Foundation** was considering Section 6 of British Human Rights Act, 1998 which required all 'public authorities' should strictly comply with the provisions of the said Act. A question arose before the Court of Appeal as to whether Leonard Cheshire Foundation (LCF); a charitable foundation established for providing accommodation is a public authority within the meaning of Section 6(3)(b) of the Human Rights Act. The facts in the said case are these. Elizabeth Heather and Hilary Callin were claimants to whom the local authority owed a duty to provide accommodation under Section 21 of the National Assistance Act, 1948. The local authority under the said Act made arrangements to accommodate both the claimants in a home run by the LCF. The claimants were indeed patients in the said home for about 17 years. LCF decided to cease to operate the home in the form in which it existed. The residents who could not be accommodated at the home were to be relocated in community based units. They applied for judicial review of the decision of the LCF to close the home. They contended that while providing accommodation to them, LCF was exercising functions of a 'public nature' within the meaning of Section 6(3)(b) of the Human Rights Act, 1998. The Judge, before whom application for judicial review came up, dismissed the same holding that LCF was not a public authority within the meaning of Section 6(3) of the Human Rights Act. The Court of Appeal, placed reliance on the earlier judgment of Lord Woolf C.J. in **Poplar Housing and Regeneration Community Association Limited v Donoghue**, and by a unanimous decision (rendered by Lord Woolf C.J.) dismissed the appeal holding that LCF was not local authority nor it can be said to exercise statutory powers in performing functions of a public nature. It was held as under.

> The role that the foundation was performing manifestly did not involve the performance of public function. The fact that it was a large and flourishing organization did not change the nature of its activities from private to public. While the degree of public funding of the activities of an otherwise private body was relevant to the nature of the functions performed, it was not by itself determinative of whether the functions were public or private. The foundation was not standing in the shoes of the local authority. Section 26 of the 1948 Act provided statutory authority for the actions of the local authority, but provided the foundation with no powers. The foundation was not exercising statutory powers in performing functions for the claimants. The fact that, if the foundation were not performing a public function, the claimants would not be able to rely on art 8 as against it could not change the appropriate classification of the foundation's function. Accordingly, the appeal would be dismissed, although it had been appropriate to bring to the court by way of judicial review the question whether the foundation was performing a public function.

The seven-Judge Bench of the Supreme Court in **Pradeep Kumar Biswas v Indian Institute Of Chemical Biology** considered the question whether the Council of

Scientific and Industrial Research (CSIR), is a State within the meaning of Article 12 of the Constitution of India. Constitution Bench of five Judges of Supreme Court in **Sabhajit Tiwari v Union Of India** held that CSIR is not an 'authority' within the meaning of Article 12 of Constitution and therefore a writ petition is not maintainable. The Supreme Court reconsidered the said judgment in **Pradeep Kumar Biswas** case (supra). The Supreme Court in its majority decision reviewed earlier case law and came to conclusion that CSIR is a State within the meaning of Article 12 of the Constitution and overruled **Sabhajit Tiwari**'s case (supra). It was held:

> The picture that ultimately emerges is that the tests formulated in AJAY HASIA v. KHALID MUJIB SEHRAVARDI {(1981) 1 SCC 722} are not a rigid set of principles so that if a body falls within any one of them it must, ex hypothesi, be considered to be a State within the meaning of Article 12. The question in each case would be – whether in the light of the cumulative facts as established, the body is financially, functionally and administratively dominated by or under the control of the Government. Such control must be particular to the body in question and must be pervasive. If this is found then the body is a State within Article 12. On the other hand, when the control is merely regulatory whether under statute or otherwise, it would not serve to make the body a State.

As held by the Supreme Court, every legal entity of public character does not necessarily become an 'authority' within the meaning of Article 12 of the Constitution. Even if a body or organization is a creature of statute, unless such body or organization is entrusted with governmental functions, fundamental to the life of people, the same cannot be treated as 'authority' 'instrumentality' and 'agency' for the purpose of Article 12 of the Constitution. A person alleging an entity to be a State must satisfy the Court of brooding presence of Government or deep and pervasive control of the Government duly demonstrating the real source of governing power.

In **Federal Bank Limited v Sagar Thomas**, the Supreme Court considered the question as to whether a private bank falls within the definition of State or local or other authorities under the control of Government within the meaning of Article 12 of the Constitution. After referring to provisions of Banking Regulation Act, 1949, the apex Court held that notwithstanding the regulatory power in relation to private bank vesting the Government as well as Reserve Bank of India, a private bank cannot be considered as 'State' and cannot be treated as performing any public duty. The relevant passages from the judgment are as under :

> Merely because the Reserve Bank of India lays the banking policy in the interest of the banking system or in the interest of monetary stability or sound economic growth having due regard to the interests of the depositors etc. as provided under Section 5(c)(a) of the Banking Regulation Act does not mean that the private companies carrying on the business of or commercial activity of banking, discharge any public function or public duty. These are all regulatory measures applicable to those carrying on commercial activity in banking and these companies are to act according to these provisions failing which certain consequences follow as indicated in the Act itself. Provision regarding acquisition of a banking company by the

Government, it may be pointed out that any private property can be acquired by the Government in public interest. It is now judicially accepted norm that private interest has to give way to the public interest. If a private property is acquired in public interest it does not mean that the party whose property is acquired is performing or discharging any function or duty of public character though it would be so for acquiring authority.

In our view, a private company carrying on banking business as a scheduled bank, cannot be termed as an institution or company carrying on any statutory or public duty. A private body or a person may be amenable to writ jurisdiction only where it may become necessary to compel such body or association to enforce any statutory obligations or such obligations of public nature casting positive obligation upon it. We don't find such conditions are fulfilled in respect of a private company carrying on a commercial activity of banking. Merely regulatory provisions to ensure such activity carried on by private bodies work within a discipline, do not confer any such status upon the company nor puts any such obligation upon it which may be enforced through issue of a writ under Article 226 of the Constitution.

The Karur Vysya Bank no doubt obtained licence from the Reserve Bank of India. Nevertheless keeping in view the law laid down by the Supreme Court, it cannot be treated as a "State" for the purpose of Article 12 of Constitution and mandamus cannot be issued to it as the same does not perform any public duty.

The petitioner is given liberty to file appeal under Section 17 of the Act before the competent authority. As the writ petition is not maintainable, this writ petition is misconceived and is accordingly dismissed. No costs.

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(V.V.S.RAO,J)

.02.2006.

NOTE

1. **L.R. Copy be marked.**

2. Dispatch copy within three days.

(By order)

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To

(One fair copy to the Hon’ble Mr. Justice V.V.S.Rao, for His Lordships kind perusal)

1. The Branch Manager, Karur Vysya Bank Limited,

Srinivasa Nagar, Main Road, Nandyal – 518 501.

2. The Secretary, A.P.Advocates' Association Library, High Court Buildings, Hyderabad.

3. 8 LR Copies.

4. 2 CD copies.